

# **Questions & Answers**

## **About the Proposed Changes to the Rule on Selecting an Upland Parcel for Water-Dependent Rents**

Washington State Department of Natural Resources  
Aquatic Resources Program  
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### **TABLE OF CONTENTS**

What is DNR doing?.....	1
What is the law and rule right now?.....	2
What are the proposed changes to the rule?.....	4
How can I be involved in this decision? .....	7

### **WHAT IS DNR DOING?**

The Washington State Department of Natural Resources (DNR) is proposing to change one of the rules (known as Washington Administrative Codes, or WACs) about leasing state-owned aquatic lands. Specifically, we are looking at changing WAC 332-30-123, which describes how DNR selects upland parcels to calculate rents for water-dependent leases. *The proposed changes are designed to clarify the rule and make it easier to understand and apply, but not change the basic way water-dependent rents are calculated.*

DNR wants your input on whether these proposed changes are a good idea, or how to make them better. At the end of this Q&A is information about how you can send us your thoughts or get your questions answered.

#### **Why is DNR proposing changes to the rule?**

DNR has been using the current rule since 1984. Over the years, some circumstances around aquatic leases and upland parcels have changed, some people have interpreted the same rule in different ways, some interpretations of this rule have been settled by court cases, and DNR staff have noticed some unusual situations that are not directly addressed by the rule. This proposed rule change is DNR's way to bring the rule up-to-date, and make it easier to understand and follow in all these situations.

#### **What is DNR's authority to do this? How does this relate to what the legislature does?**

In 1984, the state legislature passed a set of laws (RCW 79.90 through 79.96) which directed DNR to manage and protect state-owned aquatic lands and instructed DNR on how to do it, including how to calculate rents for water-dependent leases. The legislature also told DNR to write rules that further explain how to implement the law, especially the

part about water-dependent rents. It is common for the legislature to pass a general law and then instruct state agencies to work out the details. The state agencies, including DNR, must pass rules (WACs) that carry out the intent of the law.

In this proposed rule change, DNR seeks to clarify this rule and make it easier to understand and apply, but not to change the law or the basic meaning of the law. DNR does not have authority to change the laws written by the legislature, and DNR's rules cannot conflict with those laws.

### **To whom does the rule apply?**

The proposed rule changes applies to all lessees who pay water-dependent rent to DNR for leasing state-owned aquatic lands. This includes marinas, piers, marine terminals, aquatic habitat conservation and mitigation sites, and some houseboats.

This rule does not apply to nonwater-dependent leases (such as restaurants and other buildings not related to a water-dependent use), rights-of-way across aquatic lands (such as utility lines, roads, and outfalls), uses that don't pay rent to the state (such as parks, public access, and private recreational docks), filled aquatic lands (which are rented as if they were uplands), log booms, aquaculture, or other houseboats (mostly those installed after 1984). All these uses will not be affected by this rule change. (There are other rules that do apply to these uses, but DNR is not proposing to change them.)

### **How would the rule changes affect me? Would my rent change?**

The proposed changes are designed to clarify the rule and make it easier to understand and apply, but not to alter the basic meaning of the rule. The only way your rent could change is if DNR misinterpreted and thus misapplied the rule. This appears to have happened a few times, due to the rules being unclear, which is partly why DNR is clarifying them now. If you have any questions about your rent, please contact your DNR Land Manager or the contact person below.

### **WHAT IS THE LAW AND RULE RIGHT NOW?**

#### **The water-dependent rent formula**

State law says that rents for water-dependent leases are determined by using the upland parcel used in conjunction with the leased aquatic lands. DNR starts with the per-acre value of this upland parcel, not including buildings or other improvements, as determined by the county assessor.

Then, this value is multiplied by 30% (which was the legislature's way to provide a discount for water-dependent uses of aquatic lands compared to nonwater-dependent uses), then multiplied by the capitalization rate (which relates to how much of the property value should be paid each year by a renter to the owner, like a return on

investment). Finally, this is multiplied by the number of acres of state-owned aquatic lands being leased, which gives the annual rent.

In this formula, the key variable is the per-acre value of the upland parcel. Different upland values will lead to different rents.

### **Selecting alternate upland parcels**

Sometimes, there is something wrong with the upland parcel. Maybe it has not been assessed by the county assessor, or there is no upland parcel at all (perhaps because the uplands are a road), or – in the words of the law – the upland parcel “has an assessed value inconsistent with the purposes of the lease.” In such cases, the law says that DNR will instead use “the nearest comparable upland parcel used for similar purposes” to determine the rent. The law does not define exactly what all these terms mean, but instead the legislature directed DNR to write rules on them.

### **List of situations when upland parcels are “inconsistent”**

DNR’s rule (WAC 332-32-123) lists six situations where the upland parcel will be considered inconsistent and thus require the selection of an alternate parcel. The situations listed are:

- The upland parcel is not assessed;
- The assessment is more than four years old;
- The assessment results from a special tax classification not reflecting fair market value, such as for open space or farm lands;
- The assessment is under appeal;
- The majority of the upland parcel area is not used for water-dependent purposes; and
- The size of the upland parcel is not known or its small size results in a nominal valuation, such as an unbuildable lot.

Unfortunately, it is not clear whether this list is supposed to be exclusive or just some examples. This list does not include some situations that DNR has identified when the upland parcel definitely is inconsistent.

### **Other elements of the current rule**

The current rule requires that, to be used for calculating rent, the upland parcel must be waterfront and must have some portion with upland characteristics. However, it does not define these terms.

The rule also sets priorities for selecting an alternate parcel. In general, DNR is to select the upland parcel that is most similar and is physically closest to the leased area. For example, the very first priority is to select a parcel with “the same use class with the water-dependent category as the lease area use” that is within the same city. However, “use class” is not defined.

Other parts of the rule describe how they were to be implemented when it was first written, what to do when a lease includes both water-dependent and nonwater-dependent uses, how to calculate the capitalization rate, and how to adjust rents for inflation in between rent calculations every four years. DNR is not proposing to change these parts of the rule.

You can find the complete text of the law and rule on the internet at:

- RCW 79.90.480 (state law, part of the Aquatic Lands Act)  
[www.leg.wa.gov/RCW/index.cfm?section=79.90.480&fuseaction=section](http://www.leg.wa.gov/RCW/index.cfm?section=79.90.480&fuseaction=section)
- WAC 332-30-123 (DNR rules proposed to be changed)  
[www.leg.wa.gov/WAC/index.cfm?section=332-30-123&fuseaction=section](http://www.leg.wa.gov/WAC/index.cfm?section=332-30-123&fuseaction=section)

## **WHAT ARE THE PROPOSED CHANGES TO THE RULE?**

### **Clarify the meaning of “remote moorage”**

In section (1)(a) and (2)(b), the existing rule refers to “remote moorage.” However, this term is not defined. In practice, it means a lease in the middle of the water that does not touch the land. The issue comes up because DNR must still select an appropriate upland parcel for calculating rent. Unfortunately, unless there is an upland parcel that obviously is used with lease (such as a landing place for an open water moorage site), the instructions for how to select an alternate parcel are not clear.

The proposed changes are to delete the phrase “remote moorage” and replace it with “leases without a physical connection with upland property,” and to clarify that if an alternate parcel is needed, it will be selected by following the same rules that already apply to other water-dependent leases.

### **Selecting a parcel behind filled tidelands or shorelands**

In section (2)(a), the existing rule requires the upland parcel to be waterfront, which is defined elsewhere as “a parcel of property with upland characteristics which includes within its boundary a physical interface with the existing shoreline of a body of water.” A problem with this definition sometimes arises when the original shoreline has been filled – that is, when the actual existing shoreline no longer touches the upland property.

In most cases, the filled tideland or shoreland can instead be used as the “upland” property. However, in cases when the filled tideland or shoreland is inconsistent for some reason (perhaps because it is not assessed by the county assessor), the existing rule requires moving along the shoreline to select an alternate parcel. In this situation, it would be more consistent with the intent of state law to instead select the upland parcel immediately behind the filled tideland or shoreland parcel, if that the upland is associated with the lease.

The proposed change is to replace the word “waterfront” with the phrase “used in conjunction with and proximate to the leased area.” With this language, in the situation

described above, the immediately adjoining upland parcel used with the lease would be selected, even if it is slightly separated from the existing shoreline by filled tidelands or shoreland, rather than selecting a distant parcel along the shoreline. This language also ensures that the upland parcel selected will be very near, and not, for example, a parcel across town that happens to be owned by the lessee.

### **Defining “upland characteristics”**

In section (2)(a), the existing rule requires that the upland parcel used to calculate rent have “some portion with upland characteristics.” However, this term is not defined. The purpose of this part of the rule is to allow tidelands and shorelands that have been filled in – so they look like and can be developed like uplands – to be treated as the upland parcel for calculating rent.

The proposed change is to define “upland characteristics” to mean “fill or other improvements or alterations that allow for development of the property as if it were uplands and that have been valued by the county assessor as uplands.”

### **Clarifying the list of situations when upland parcels are “inconsistent”**

In section (3), the existing rule says “the following situations will be considered inconsistent,” and then includes a list of situations. “Inconsistent” means that something is wrong with the upland parcel, and DNR needs to select an alternate parcel for calculating rent. However, while the law is clear that DNR should select an alternate parcel every time there is something wrong with the upland parcel, the WAC is not clear on whether the list is exclusive. In other words, the current WAC could be read to say that no other situation not specifically listed can be considered inconsistent. However, based on the law, DNR’s practice is to consider this a list of examples, and to consider all similar situations, even if not specifically mentioned in the rule, also to be inconsistent.

The proposed change is to clarify that the situations listed in this section are examples, not an exclusive list, of situations when an upland parcel is inconsistent and an alternate parcel must be selected.

### **Clarifying when an upland parcel is not properly assessed**

In section (3)(c), one example of an inconsistent upland parcel is when the assessment is based on “a special tax classification not reflecting fair market value,” such as when the land is designated for open space or forestry. However, sometimes the county assessor sets the assessed value at something other than fair market value for reasons other than a “special tax classification.”

For example, in La Conner, the county assessor lumped some very small, undevelopable upland parcels together with their abutting aquatic lands to calculate the value for both combined. This value, though, did not accurately reflect the uplands alone, and would have dramatically raised rents for the aquatic lessees. Again, while the law is clear that

DNR should select an alternate parcel every time there is something wrong with the upland parcel, the WAC did not specifically address this situation. In this case, based on the law, DNR selected an alternate parcel that was assessed properly (and saved money for the lessees).

The proposed change is to say the upland parcel is inconsistent when the assessment is based on “a special tax classification or other adjustment by the county assessor not reflecting fair market value as developable upland property.”

### **Selecting upland parcels used with (not for) water-dependent uses**

In section (3)(e), another example of an inconsistent upland parcel is when it “is not used for a water-dependent purpose.” Unfortunately, this language has caused great confusion, because uplands are never really used *for* water-dependent purposes; instead, they are used *with* water-dependent uses that are on the abutting aquatic lands. Recently, DNR was even taken to court over this.

The proposed change (based on the judge’s decision) is to say that the upland parcel is inconsistent when it “is not used in conjunction with a water-dependent use.”

### **Not selecting upland parcels that are contaminated**

Another example of an inconsistent upland parcel (though not yet listed in the rule) is when the upland parcel is contaminated with hazardous materials. In this situation, the fair market value of the property can be greatly reduced, because of the cost any buyer would have to pay to clean it up. However, this reduced value does not reflect the value of the abutting aquatic lands, and the lessee should not benefit financially from polluting their uplands.

The proposed change is to add section (3)(g), which says that an upland parcel is inconsistent when “the assessed value reflects the presence of contamination on the uplands.”

### **Providing examples of “use classes”**

In section (4)(b), the existing rules give priorities for selecting an alternate parcel. The top priority is an upland parcel used with another lease in “the same use class.” However, this term is not defined.

The proposed change is to add a list of examples of use classes. This new list reflects DNR’s current practice.

## **HOW CAN I BE INVOLVED IN THIS DECISION?**

### **Will there be public hearings?**

DNR will hold four public hearings on these proposed rule changes. Every member of the public is welcome to attend and speak

Public hearings:

#### Seattle

- September 8
- 6 PM
- Queen Anne Community Center, 1901 First Ave W

#### Olympia

- September 15
- 6 PM
- Timberland Library, Franklin and 8<sup>th</sup>

#### Mount Vernon

- September 19
- 6 PM
- Police Station, 1805 Continental Place

#### Friday Harbor

- September 22
- 6 PM
- San Juan Island Library, 1010 Guard St.

### **How else can I comment on the proposed rules? Who can I talk to if I have questions?**

If you would like to provide written comments, or you have any questions about the proposed rule changes or the process, please contact:

Matthew Green

Washington State Department of Natural Resources

P.O. Box 47027

Olympia, WA 98504

(360) 902-1116

[matthew.green@wadnr.gov](mailto:matthew.green@wadnr.gov)

Please send your comments by September 26, 2005. Comments by e-mail are welcome.

### **What is the timeline for DNR to consider these proposed rule changes?**

The timeline for considering these proposed rule changes is:

- Public hearings in September
- Review of all the public comments in October
- Final decision in November, by the Board of Natural Resources

### **Who makes the final decision about these proposed rule changes?**

DNR is not actually the final decision-maker about the rule. The final decision is made by the Board of Natural Resources (BNR), which is the policy body directed to oversee DNR's management of state lands. DNR staff will present the proposed rule changes and all the comments from the public (received at the hearings or in writing) to the Board.

Thank you for your interest.